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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NEERAJ PUNGLIA, Plaintiff and Appellant, v. STATE PERSONNEL BOARD, Respondent; DEPARTMENT OF TRANSPORTATION, Real Party in Interest.	A094434 (Alameda County Super. Ct. No. 8281632)

Appeal from the judgment denying a petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5).

Appellant Neeraj Punglia was a licensed civil engineer with more than 35 years experience when he was appointed to the position of "Transportation Engineer (Civil)" with the Department of Transportation (Caltrans) on April 20, 1998. Because this was appellant's first state job, he was required to complete a one-year probationary period. His performance was deemed unsatisfactory and appellant was "rejected" (i.e., terminated) from his position on April 23, 1999. Appellant appealed to the State Personnel Board (Board).

An evidentiary hearing was conducted before an administrative law judge (ALJ) in November of 1999. In March of 2000 the ALJ concluded that "there was substantial evidence that appellant's work performance was deficient during his one-year

probationary period, and that it did not improve despite appropriate counseling and training. There was no credible evidence of fraud or bad faith in the Department's action of rejecting him. The rejection must therefore be affirmed." Later that month the Board adopted the ALJ's proposed findings of fact and recommended decision.

In June of that year appellant filed a petition for administrative mandamus. Appellant alleged that the Board's decision "is not supported by the findings in that, among other things, the findings fail to: address charges raised in the Notice of Rejection; take account of conflicting testimony from [appellant's] supervisors adduced at the hearing as to material points; take account of conflicts between testimony adduced at the hearing and documentary evidence written at the time of the event in question; take account of the evidentiary effect of numerous material misrepresentations in termination documents such as the Notice of Rejection/Statement of Reasons and [appellant's] performance reviews; [and] take note of relevant CALTRANS policy." Appellant further alleged that seven of the ALJ's findings of fact were not supported by substantial evidence.

After reviewing the administrative record, the trial court denied the petition. This timely appeal is from the judgment entered in due course.

"Preliminarily, it must be noted that probationary employees have only statutory rights and have no vested interest in employment. [Citation.] A rejected probationary employee may be reinstated only on a showing that there was no substantial evidence to support the decision. [Citation.] The independent judgment test applicable to a permanent, nonprobationary employee . . . does not pertain to a rejected probationary employee. Absent proof to the contrary, it is to be presumed the findings of the administrative agency are correct and supported by substantial evidence [citation] and that the agency performed its duties as required by law [citation]. It is the petitioner's burden to demonstrate that the administrative proceedings were unfair or constituted an abuse of discretion." (*Lee v. Board of Civil Service Comrs*. (1990) 221 Cal.App.3d 103, 108.)

"When the substantial evidence test applies, the trial court exercises an essentially appellate function . . . . On appeal, our scope of review is identical to that of the trial court." (*Lowe v. Civil Service Com.* (1985) 164 Cal.App.3d 667, 676.) Thus, both the trial court and this court must "resolve all conflicts in favor of the prevailing party, indulging in all legitimate and reasonable inferences from the record. When a finding is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence in the record, contradicted or uncontradicted, that will support the finding. When two or more inferences can be reasonably deduced from those facts, the reviewing court has no power to substitute its deductions for those of the fact finder." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374.) Because the substantial evidence test in the administrative context is the same as in the purely judicial (see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-571), one issue that is reserved exclusively for the trier of fact—in this case the Board—is the power to decide witness credibility. (E.g., *Watson v. Poore* (1941) 18 Cal.2d 302, 311; *Kelly-Zurian v. Wohl Shoe Co*. (1994) 22 Cal.App.4th 397, 409; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, § 91, p. 127.) Two aspects of this power are that the trier can accept part of a witness's testimony while rejecting others (*Kelly-Zurian v. Wohl Shoe Co*., *supra*), and the trier is not required to accept uncontradicted testimony (*Rodney F. v. Karen M*. (1998) 61 Cal.App.4th 233, 241).

We have paid particular attention to the issue of witness credibility because appellant spends an inordinate amount of time in his briefs attacking the testimony of Uldarico Perez, his immediate supervisor and one of the seven witnesses heard by the ALJ. If a part of Mr. Perez's testimony could have been credited by the Board, we must assume that it was, notwithstanding that it conflicts with other testimony by Mr. Perez or other witnesses. Moreover, the testimony of Mr. Perez, or any other witness, is sufficient by itself to constitute substantial evidence. (Evid. Code, § 411; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

"A rejection during probationary period is effected by the service upon the probationer of a written notice of rejection which shall include . . . a statement of the reasons for the rejection." (Gov. Code, § 19173, subd. (b)(1).) Appellant contends that "The Board's failure to identify substantial evidence for the[] allegations in the statement of reasons constitutes a lack of substantial evidence to support the reasons for rejection." Not so. That proposition conflates the notice purpose of the statement of reasons with the evidentiary purpose of the hearing before the ALJ. If appellant is arguing that the employer's notice of rejection was insufficiently precise to provide him adequate notice for the hearing—an argument he did not make at the hearing itself—he will not prevail. The notice provided appellant did not employ broad characterizations such as "the good of the service and for his failure to demonstrate merit, efficiency and fitness" or " 'actions unbecoming an employee' " (see *Dona v. State Personnel Board* (1951) 103 Cal.App.2d 49, 50-51 and decisions cited). Rather, the notice of rejection listed nine paragraphs of particulars such as specific date, hour of day, or specific project. The notice had three further paragraphs providing specifics for the statement "You have been notified of prior non-compliance and/or deficiencies as follows: . . . ." There followed a discussion mentioning two "probation" reports. The notice of rejection also informed appellant that "Copies of all documents or other material used as a basis for this action are attached and incorporated herein by reference." Appellant makes no claim that the materials were not in fact attached to the notice. Viewed in its entirety, the notice of rejection was more than adequate to comply with Government Code section 19173.

One of the findings proposed by the ALJ and adopted by the Board read: "During his one-year probationary period, appellant principally worked on the redesign of a single intersection in Napa County. This was a relatively small project which appellant's supervisors expected him to finish quickly and move on to other projects. Instead, appellant had difficulty from the outset learning how to use the Caltrans computer system. Appellant was sent to several training classes, but he complained about the quality of the training and still had problems with the computer. *Appellant was extremely slow in producing plans, and when he did so, they often had errors. When the errors*

were pointed out to him, appellant took an inordinate amount of time correcting them. Appellant kept missing deadlines, and as a result, the project fell behind and was never completed in the year appellant worked on it." (Fn. omitted.) Appellant contends that the portion we have italicized deals with a matter that was not mentioned in the notice of rejection. Again, not so. As previously mentioned, the notice of rejection included attachments of appellant's probation reports. One of those reports, the one for January 28, 1999, told appellant: "You are currently assigned to . . . a Minor A project. Based on the time it has taken to get the project as far along as you have it, I believe you do not yet meet the standards of work performance of a Transportation Engineer, . . . [¶] I recommend that you take the following steps to improve your performance: [¶] . . . [¶] Improve the speed of your work." The report dated March 22, 1999, told appellant: "You are too slow in responding to issues and comments from various concerned Offices during the PS&E[1] circulation. As you know, by not promptly responding, the PS&E submittal to the Office Engineer has been delayed again. The project assigned to you is a very simple minor project and can easily be done by a new Transportation Engineer even with no or little experience. Actually, with your 30 plus years of experience you should be able to handle minor projects without any difficulty. In my opinion, there is absolutely no reason for your unacceptable performance because you attended every available training class. . . ." The same report detailed appellant's work on the Napa project and stated that on February 10, 1999, appellant's superiors told him that "the typical cross section plan sheet that is in error and needs to be corrected. . . . On February 19, 1999, Louis and I inquired about the status and progress of the plan sheet corrections and you claimed that the typical cross sections are correct, and failed to make the corrections as previously discussed. Therefore, Louis and I showed you the obvious errors and explained to you again in detail why the corrections were necessary. Plan sheets were given back to you to work on the corrections. On March 17, 1999, we inquired again about the status of the project." Again we conclude that the notice of rejection was more than adequate to comply with Government Code section 19173. We

[1] Which stands for "Plans Spec Estimate."

further conclude that the finding quoted above did not deal with a subject appellant had no way of knowing might be at issue.[2]

Appellant next contends that one of the Board's findings is not supported by substantial evidence. The challenged finding deals with appellant's reaction to his January 28, 1999, probation report. It reads: "Appellant's supervisors expected appellant to redouble his efforts to improve his work performance after receiving his second report of performance. Instead, appellant reacted inappropriately by telling his office chief that he did not want to put his registered engineer seal and signature on plan sheets any longer, and by leaving work early without permission. When confronted by his supervisor about leaving early, appellant said 'You got me.' " The "You got me" statement was made to Mr. Perez and recounted by him at the hearing. As previously mentioned, the rules of our review require that this statement must have been deemed credible by the Board and, as the trier of fact, that credibility determination is conclusive for purposes of judicial review. (*Watson v. Poore*, *supra*, 18 Cal.2d 302, 311; *Kelly-Zurian v. Wohl Shoe Co*., *supra*, 22 Cal.App.4th 397, 409.) Perez's testimony constitutes substantial evidence. (Evid. Code, § 411; *In re Marriage of Mix*, *supra*, 14 Cal.3d 604, 614.) As for appellant's refusal "to put his registered engineer seal and signature on plan sheets," Caltrans employee Ramsey Hissen's testimony is sufficient to support the finding.[3]

The Board is empowered to restore a probationary employee "to the position from which he or she was rejected, but this shall be done only if the board determines, after a hearing, that there is no substantial evidence to support the reason or reasons for rejection, or that the rejection was made in fraud or bad faith." (Gov. Code, § 19175, subd. (d).) As previously mentioned, the Board found "no credible evidence of fraud or

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[2] It is pertinent to note that appellant worked in the special projects unit, which handled assignments, mostly "emergencies," on a speed-is-of-the-essence basis.

[3] In his reply brief appellant argues that other findings are not supported by substantial evidence. We will not address these belated arguments, which should have been made in appellant's opening brief. (*Kahn v. Wilson* (1898) 120 Cal. 643, 644; *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1482, fn. 11.)

bad faith" in appellant's rejection. Appellant's final contention is that he "sustained his burden of proving that the rejection was made in bad faith." He points out that not all of the grounds enumerated in the statement of reasons were contested at the hearing or sustained by the Board. Nevertheless, the Board found substantial evidence supported enough of the grounds to warrant appellant's termination. Our review of the administrative record has disclosed that the quantum of evidence supporting the Board's decision verges on the abundant. The statutory standard of "bad faith" has been treated as synonymous with "animus." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1640.) This court has held in a different context that bad faith is an issue of fact ordinarily requiring " 'an inquiry into motive, intent and state of mind.' " (*Walbrook Ins. Co. v. Liberty Mutual Ins. Co*. (1992) 5 Cal.App.4th 1445, 1454, quoting *Davy v. Public National Ins. Co*. (1960) 181 Cal.App.2d 387, 397.) Appellant recognized as much at the hearing; the Board's finding on bad faith noted appellant's claim "that minor inconsistencies in documents and testimony demonstrate that his supervisors were lying and took this action in bad faith." Appellant thus put the credibility of his superiors at issue. The Board's resolution of that issue against appellant is not open to reexamination here (*Watson v. Poore*, *supra*, 18 Cal.2d 302, 311; *Kelly-Zurian v. Wohl Shoe Co*., *supra*, 22
Cal.App.4th 397, 409), and that determination furnishes a sound basis for the Board's finding that appellant had not proved bad faith.

The judgment is affirmed.

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Kay, J.

We concur:

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Reardon, Acting P.J.

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Sepulveda, J.